Editor's note: Reconsideration granted; decision reversed and remanded -- See Weyerhaeuser Co., 34 IBLA 244 (March 28, 1978)

WEYERHAEUSER COMPANY

IBLA 77-574 Decided January 5, 1978

Appeal from decision of the Eugene, Oregon, District Office, Bureau of Land Management, denying request for credit for purchase price of rock under material sales contract OR 090-MP7-54.

Affirmed.

1. Materials Act

> Where the purchaser of rock under a cash sale contract authorized by the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970), fails to remove any of the rock and requests a credit for the purchase price, such a request will be denied as being tantamount to a refund and purchaser under a fixed unit material sale is not entitled to a refund even though the amount of material removed is less than the estimated total volume shown in the contract.

APPEARANCES: J. W. Gischel, Jr., Land Use Supervisor, Weyerhaeuser Company, Springfield, Oregon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

By letter dated May 17, 1977, Weyerhaeuser Company requested that the Bureau of Land Management (BLM), sell to the company 7,500 cubic yards of pit run rock from land administered by BLM in the NW 1/4 SE 1/4, Section 27, T. 22 S., R. 3 W., Willamette Meridian, Oregon.

On June 6, 1977, Weyerhaeuser and BLM entered into a cash sale contract authorized by the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970), whereby Weyerhaeuser agreed to purchase 7,500 cubic yards of pit run quarry rock at 25 cents per cubic yard for a total contract price of $1,875. The contract was to expire on August 31, 1977.

In a letter received by BLM on August 29, 1977, Weyerhaeuser stated:

> Weyerhaeuser Company requests that the purchase of 7,500 cubic yards of pit run rock from your quarry in the NW 1/4 SE 1/4, Section 27, T. 22 S. R. 3 W. be cancelled and the $1,875.00 be held as credit against future purchase of rock from the Eugene District. Weyerhaeuser Company did not remove any rock products from this quarry due to the type and quality of the material.

By decision dated September 6, 1977, BLM denied the request of Weyerhaeuser to hold the $1,875 as a credit against future purchase of rock. BLM stated:

> Our response to your request is mandated by regulation as specified in 43 CFR 3610.4(c) (last sentence) which states:
>
> > The purchaser shall not be entitled to a refund on a fixed unit sale even though the amount of material removed or designated for removal may be less than the estimated total volume shown in the contract.
>
> Likewise Section 2 of the contract (BLM Form 3600-4, July 1966) states, in part:
>
> > Purchaser shall be liable for the total purchase price shown above, even though the quantity of materials extracted, severed, or removed or designated therefor, is less than the estimated quantity set forth above.

On appeal, Weyerhaeuser reaffirms its request for a credit, stating only that the "rock was not removed during the term of the contract due to a change in construction priorities and in addition was unsuitable for our use during this period."

Appellant's declining to remove the rock within the life of the contract was a decision it made and cannot vitiate the rights of the United States. Appellant does not allege any factors which might excuse its lack of performance under the contract. It merely states that the company changed its construction priorities and the material contracted for was unsuitable for use by the company during the life of the contract.

The regulation relied upon by BLM, 43 CFR 3610.4(c), clearly states that a purchaser under a fixed unit sale is not entitled

to a refund even though the amount of material removed is less than the estimated total volume shown in the contract. Herein, Appellant failed to remove any of the material for which it contracted. The contract, Section 2, expressly states that the purchaser is liable for the total purchase price regardless of whether the quantity of materials extracted is less than the estimated quantity. Appellant has requested a credit for the purchase price of the rock. To allow Appellant a credit for the purchase price would be tantamount to a refund and BLM is foreclosed from refunding any amount under the contract due to the express language of 43 CFR 3610.4(c). Therefore, BLM acted properly in denying Appellant's request for a credit for the purchase price of the rock.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge